ARAB-MALAYSIA FINANCE BHD.

v.

MALACCA DEVELOPMENT CORPORATION SDN. BHD. & ORS.

HIGH COURT MALAYA, MALACCA
AUGUSTINE PAUL JC
[CIVIL SUIT NO: 22-108 OF 1990]
27 MARCH 1997

CIVIL PROCEDURE: *Want of prosecution - Striking out counterclaim for want of prosecution at the instance of the Court - Time - Delay in not proceeding in cause of action - Rules of the High Court 1980, O. 34 r. 8(2)*

CIVIL PROCEDURE: *Action - Dismissal of action - Affidavits - Need for evidence on affidavits to answer notice to show cause - Disposal of action without trial - Striking out*

CIVIL PROCEDURE: *Judgments and orders - Alteration of - Amendment of order - Perfected order - Court powers to review its earlier order - Discretion of the Court, how exercised - Rectification - Mistake - Rules of the High Court 1980, O. 20 r. 11*

This suit was originally filed on 28 October 1988. The 5th, 6th and 8th defendants entered appearance on 10 October 1989 and filed their statement of defense and counterclaim on 13 November 1989. The plaintiff's application for summary judgment was dismissed on 4 February 1994 but was reversed by the Supreme Court on 17 July 1995 with a further order that there be a stay of execution of the judgment entered against the 5th, 6th and 8th defendants till the hearing of their counterclaim. Thereafter no further action was taken by the defendants to prosecute their counterclaim.

On 17 October 1996 the Court fixed the case for disposal pursuant to O. 34 r. 8(2) of the Rules of the High Court 1980. The issue at hand was whether the counterclaim by the Defendants should be dismissed for want of prosecution at the instance of the Court. The Court also dealt with the procedure to be followed for such a proceeding, the scope of the exercise of a discretion and the instances in which a Court could recall and vary an order that it had made earlier.

Held:

[1] The Court held that it had jurisdiction to dismiss a counterclaim for want of prosecution just as in the case of a claim by the plaintiff both under its inherent jurisdiction to control litigation and the relevant rules of the

Rules of the High Court 1980 which made it clear that a counterclaim is equivalent to an independent action and that the rules which apply to a plaintiff in a main action also apply to a defendant conducting a counterclaim in that neither could be permitted to allow the claim to remain unprosecuted without sanction.

[2] The principles governing the Court's discretion to dismiss an action for want of prosecution which were first stated by the English Courts in the case of *Allen v. Sir Alfred Mc Alpine & Sons* and later approved by the House of Lords in *Birkett v. James* were contemplated as being applicable only when the application to dismiss an action for want of prosecution was made by the defendant. This was because their rules do not have a provision equivalent to our O. 34 r. 8(2) of the Rules of the High Court 1980. Where the proceeding to dismiss the plaintiff's claim was initiated by the defendant the burden would be on him to establish the requirements of the principles.

[3] In the case where the proceedings to dismiss an action was initiated by the Court itself as authorized under O. 34 r. 8(2) of the Rules of the High Court, 1980, the rationale for empowering such an action involved different considerations from that applicable when a similar proceeding was instituted by a defendant. This was because the only possible ground on which the Court may institute such proceedings was when the parties had failed to comply with r. 8(2) within the time specified therein. The question of the default being intentional or contumelious or that the delay was inordinate and inexcusable and that such delay was likely to cause prejudice to the defendants at the time of the issue of the notice to show course as enunciated in the *Birkett's* case did not arise for the reason that they would not be within the knowledge of the Court in the normal course of events at that stage. The Court would only be aware that no notice of trial had been given by the plaintiff and that the defendant had not taken steps to have the action dismissed for want of prosecution.

[4] To insist upon the principles enunciated by the English Courts being a pre-condition to entitle the Court to exercise its powers under r. 8(2) would be an attempt to lay down rules in a statute which did not exist. This in turn would mean that the Court itself would be fettering a discretion entrusted to it by law and thereby preclude itself from exercising that discretion properly. The guidelines laid down by the Courts to be followed in the exercise of a discretion were there for assistance only and were not to be used as rules never to be departed from. That r. 8(2) empowering the Court to initiate the proceeding to dismiss an action for want of prosecution was anchored on policy considerations and hence the Court was free to depart from the principles applied in the *Birkett's* case.

[5] Thus, the Court was authorized to issue a notice to show cause when it became entitled to do so under r. 8(2) at the expiry of the stipulated time period. The burden would then be on the plaintiff to explain the reason or reasons for his inaction if he does not desire the action to be dismissed or any other order being made. If no satisfactory explanation was offered by the plaintiff for the delay, it would mean that his action amounts to intentional and contumelious conduct warranting the Court to act under r. 8(2).

[6] The Court held that to answer the notice to show cause issued by the Court, there must have been an affidavit to explain the delay and not a mere statement from the Bar.

[7] It was settled law that after a judgment or order had been perfected, amendments may only be made to it in relation to clerical errors, accidental slips and omissions as provided by O. 20 r. 11 of the Rules of the High Court 1980. In the case where an order had not been perfected, the Court undoubtedly possessed the power to recall the order with a view to withdraw, alter or modify it. However that power was not as untrammeled as it appeared to be. It must be shown that something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

[8] In the case of the 5th and 6th defendant, the Court held that they had not advanced any cogent reasons to enable a review of the earlier Order pronounced by the Court. However, in the case of the 8th defendant, when the Order was made, it was not brought to the Court's attention that he had been adjudged a bankrupt. Upon a person being adjudged a bankrupt, his estate vested with the Official Assignee. Also the retainer of the solicitor for the 8th defendant was terminated upon his bankruptcy. Therefore, the notice to show cause with regard to the 8th defendant ought to have been served on the Official Assignee. As such, the order made against the 8th defendant by the Court may be wrong and was withdrawn. The Senior Assistant Registrar was directed to serve a fresh notice on the Official Assignee.

[Order against 8th defendant withdrawn. Application of 5th and 6th defendants dismissed with costs.]

Cases referred to:
Owen v. Pugh [1995] 3 All ER 345 ***(refd)***
Allen v. Sir Alfred Mc Alphine & Sons [1968] 1 All ER 543 ***(refd)***
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150 ***(refd)***
Sim Lim Finance Ltd. v. Highlight Industry Pte. Ltd. & Ors. [1987] 2 MLJ 656 ***(refd)***

Wee Siew Noi v. Lee Mun Tuck [1993] 2 SLR 232 ***(refd)***
Ling Kee Ling v. Leow Leng Siong [1992] SLR 725 ***(refd)***
Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia [1995] 2 MLJ 185 ***(refd)***
Wong Yit Shing v. Sim Teow Gok & Co. [1994] 3 SLR 445 ***(refd)***
Westminister City Council v. Clifford Culpin & Partners [1987] 137 NLJ 736 ***(refd)***
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(not foll)***
Tajjul Ariffin bin Mustafa v. Heng Cheng Hong [1993] 2 MLJ 143 ***(refd)***
R v. Sevenoaks [1985] 3 All ER 226 ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
R v. Nicholas The Times, 23 Apr (1986) ***(refd)***
Cookson v. Knowles [1978] 2 All ER 604 ***(refd)***
QBE Insurance Ltd. v. Sim Lim Finance [1987] 2 MLJ 656 ***(refd)***
Ng Hee Thoong v. Public Bank Bhd. [1995] 1 MLJ 281 ***(refd)***
R v. Registrar of Greenwich County Court [1885] 15 QBD 54 ***(refd)***
Richardson v. Peto [1840] 1 Man & G 896 ***(refd)***
Pereira v. Beanlands [1996] 3 All ER 528 ***(refd)***
Public Finance Bhd. v. Natcom Development Sdn. Bhd. & Ors. [1996] 2 MLJ 657 ***(refd)***
In re Harrison's Settlement [1955] 1 Ch. 260 ***(refd)***
Chua Wah Keow v. Ng Ho Huat & Anor. [1961] MLJ 32 ***(refd)***
Khoo Cheng Tat v. Lim Soon Teck [1982] 1 MLJ 289 ***(refd)***
Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co. [1973] 1 WLR 300 ***(refd)***
Hock Hua Bank Bhd. v. Shari bin Murid [1981] 1 MLJ 143 ***(refd)***
Pearlman (Veneers) SA (Pty) Ltd. v. Bernhand Bartels [1954] 1 WLR 1457 ***(refd)***
Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1991] 1 MLJ 221 ***(refd)***
Hatten v. Harris [1892] AC 560 ***(refd)***
Koperasi Perumahan Kotawira Bhd. v. Kadir bin Kassim & 2 Ors. [1991] 2 CLJ 1529 ***(refd)***
Hall v. Harris [1900] 25 VLR 455 ***(refd)***
Chee Kuan Cheng v. Chuo Kong Kah [1967] 2 MLJ 74 ***(refd)***
Pittalis v. Sherefa Hin [1986] 2 All ER 227 ***(refd)***
Lim Yam Teck v. Lim Swee Chiang & Anor. [1979] 1 MLJ 162 ***(refd)***
Millensted v. Grosvenor House (Park Lane) Ltd. [1937] 1 All ER 736 ***(refd)***
Bastow v. Bagley & Co. Ltd. [1961] 3 All ER 1101 ***(refd)***
Dietz v. Lennig Chemicals Ltd. [1966] 2 All ER 962 ***(refd)***
Barell Enterprises & Ors. [1972] 3 All ER 631 ***(refd)***
XL Petroleum Pty. Ltd., Re [1971] VR 560 ***(refd)***
Tomlinson v. Commissioner of Taxation [1977] 7 ATR 639 ***(refd)***
Lakhand Nathermal v. Kamaluddin bin Maamor [1991] 1 CLJ 42 ***(refd)***
Gill v. Woodfin 25 Ch. D 707 ***(refd)***
Aley Kutty James v. Syed Putra bin Syed Omar Shahabudin [1979] 1 MLJ 238 ***(refd)***
Idris bin Haji Salleh v. Federal Auto Holdings Bhd. [1979] 2 MLJ 141 ***(refd)***
Sabah Bank Bhd. v. Syarikat Bintang Tengah Sdn. Bhd. & Ors. [1992] 2 MLJ 588 ***(refd)***
Drew v. Nunn [1879] 4 QBD 661 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 34 r. 8(2)

For the applicant - Azad Bashir bin Abdul Kariem Bashir; M/s. Bashir & Co.
For the respondent - Khoo Teng Aun; M/s. P.M. Tan, Chan & Partners

JUDGMENT

Augustine Paul JC:

This suit was originally filed in the Kuala Lumpur High Court on 28 October 1988. The 5th, 6th, and 8th defendants entered appearance on 10 October 1989 and filed their statement of defence and counterclaim on 13 November 1989. By order of Court dated 28 March 1990 the suit was transferred to the High Court at Melaka. The plaintiff's application for summary judgment was dismissed by the High Court on 4 February 1994 but was reversed by the Supreme Court on 17 July 1995 with a further order that there be a stay of execution of the judgment entered against the 5th, 6th and 8th defendants till the hearing of their counterclaim. Thereafter no further action was taken by the defendants to prosecute their counterclaim. Thus on 17 October 1996 the Court fixed the case for disposal pursuant to O. 34 r. 8(2) of the Rules of the High Court 1980 and informed the parties accordingly. Order 34 r. 8 reads as follows:

> 8(1) If in any cause or matter where a notice of trial is required the plaintiff does not within six weeks after the time when he first becomes entitled to give notice of trial under r. 7 of this Order or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.
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> (2) If no notice of trial is given or if the defendant makes no application to dismiss the action under sub-r. (1), the Court or Judge may after giving such notice as may be necessary dismiss the cause or matter or may make such order and on such terms as to costs or otherwise as to the Court or Judge may seem just.

The Court also has jurisdiction to dismiss a counterclaim for want of prosecution just as in the case of a claim by the plaintiff both under its inherent jurisdiction to control litigation and the relevant rules of the Rules of the High Court 1980 which make it clear that a counterclaim is equivalent to an independent action and that the rules which apply to a plaintiff in a main action also apply to a defendant conducting a counterclaim in that neither could be

permitted to allow the claim to remain unprosecuted without sanction (see *Owen v. Pugh* [1995] 3 All ER 345).

The principles governing the Court's discretion to dismiss an action for want of prosecution were first stated by Salmon LJ in A*llen v. Sir Alfred Mc Alpine & Sons* [1968] 1 All ER 543 and later approved by the House of Lords in *Birkett v. James* [1977] 2 All ER 801. The principles enunciated are that the power to dismiss an action for want of prosecution should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, eg. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants as between themselves and the plaintiff or between each other or between them and a third party. I shall hereafter refer to them as "the principles". The principles have been adopted in Singapore and Malaysia. See *Vasudevan v. Damodaran & Anor.* [1981] 2 MLJ 150; *Sim Lim Finance Ltd. v. Highlight Industry Pte. Ltd. & Ors.* [1987] 2 MLJ 656; *Wee Siew Noi v. Lee Mun Tuck* [1993] 2 SLR 232; *Ling Kee Ling v. Leow Leng Siong* [1992] SLR 725; *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia* [1995] 2 MLJ 185 and *Wong Yit Shing v. Sim Teow Gok & Co.* [1994] 3 SLR 445. I must add that the principles were criticised by Kerr LJ in *Westminister City Council v. Clifford Culpin & Partners* [1987] 137 NLJ 736 where his Lordship said at p. 737,

> By far the major part of all delays stems solely from the way in which litigation is conducted. In this connection our law needs to be changed, both in substance and procedurally. The principles laid down in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801 are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover they then breed excessive further delays and costs in their application. The long line of decisions concerned with striking out application, both reported and unreported, demonstrate that the regime of *Birkett v. James* should be replaced by a system of rules which are much stricter, more effective and simple to apply.

It must be observed that the principles were contemplated as being applicable by the English Courts only when the application to dismiss an action for want of prosecution is made by the defendant as their rules do not have a provision equivalent to our r. 8(2). Where the proceeding to dismiss the plaintiff's claim is initiated by the defendant the burden is on him to establish the requirements of the principles (see *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia (sued as a firm) & Ors.* [1995] 2 MLJ 185).

A matter of considerable significance is the extent to which the principles apply when the proceeding to dismiss the action is initiated by the Court itself as authorised under r. 8(2). In *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 the Federal Court said that whether the application is made by the defendant or on a notice to show cause issued by the Court the principles which guide the Court in determining the question whether the action should be dismissed remain the same.

In my opinion, and with respect, the rationale empowering the dismissal of an action for want of prosecution at the instance of the Court must as of necessity involve different considerations from that applicable when a similar proceeding is instituted by a defendant. This is for the reason that the only possible ground on which the Court may institute such proceedings is when the parties have failed to comply with r. 8(2) within the time specified therein. The question of the default being intentional or contumelious or that the delay was inordinate and inexcusable and that such delay is likely to cause prejudice to the defendants at the time of the issue of the notice to show cause do not arise for the simple and plain reason that they will not be within the knowledge of the Court in the normal course of events at that stage. The Court would only be aware that no notice of trial has been given by the plaintiff and that the defendant has not taken steps to have the action dismissed for want of prosecution. To insist upon the principles being a pre-condition to entitle the Court to exercise its powers under r. 8(2) is an attempt to lay down rules in a statute which do not exist. This in turn would mean that the Court itself would be fettering a discretion entrusted to it by law and thereby preclude itself from exercising that discretion properly. In this regard Edgar Joseph Jr. FCJ said in *Tajjul Ariffin bin Mustafa v. Heng Cheng Hong* [1993] 2 MLJ 143 at p. 152:

> As was well put by Bowen LJ in *Jones v. Curling* 13 QBD 262 at p. 271:
>
> I have always entertained the strongest opinion that the Court would be acting *ultra vires* if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or judicature rule which creates the discretion gives it in simple and unqualified terms.
>
> It follows, that if Judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the Court then, as was pointed out by Brett MR in *The Friedberg* 10 p. 112 at p. 113, they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do.

And Glidewell J said in *R v. Sevenoaks* [1985] 3 All ER 226 at p. 229:

> It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly. The cases in which the principle has been applied are, first, the adoption of an overall policy on a particular issue which effectively removes discretion, for example a policy of a licensing authority not to grant licenses in defined circumstances, and, second, the giving of an undertaking, normally by way of contract, not to exercise discretion in a particular way.

It is now appropriate to state that guidelines laid down by Courts to be followed in the exercise of a discretion are there for assistance only and are not to be used as rules never to be departed from (see *Evans v. Bartlam* [1937] AC 473; *R v. Nicholas The Times*, 23 Apr 1986; *Cookson v. Knowles* [1978] 2 All ER 604). Hence the statement in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 on the applicability of the principles to a proceeding initiated by the Court to dismiss an action for want of prosecution must be understood in that light. It has also been suggested that as r. 8(2) empowering the Court to initiate the proceeding to dismiss an action for want of prosecution is anchored on policy considerations the Court is free to depart from the principles applied in *Birkett v. James* [1977] 1 All ER 801 (see *QBE Insurance Ltd. v. Sim Lim Finance Ltd.* [1987] 2 MLJ 656). Thus, in my opinion, the Court is authorised to issue a notice to show cause when it becomes entitled to do so under r. 8(2) at the expiry of the stipulated time period. The burden is then on the plaintiff to explain the reason or reasons for his inaction if he does not desire the action to be dismissed or any other order being made. If no satisfactory explanation is offered by the plaintiff for the delay it would mean that his action amounts to intentional and contumelious conduct warranting the Court to act under r. 8(2) (see *Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152). The fact that the defendant has not been prejudiced by the delay may be raised by the plaintiff as an additional ground in support of his case. However, the fact that the delay is not inordinate is not relevant.

I now return to 8 November 1996 when the notice issued by the Court came up for hearing. Learned Counsel for the 5th, 6th and 8th defendants requested for an adjournment of two weeks to enable him to get further instructions from his clients. I acceded to the request and refixed the case for disposal on 22 November 1996.

When the case was called up again on 22 November 1996 learned Counsel for the plaintiff prayed that the counterclaim be struck off as no action had been taken by the defendants to apply for directions with regard to the counterclaim. To this the reply of learned Counsel for the defendants was that if the plaintiff wished to have the counterclaim struck off it should have made

a formal application to that effect. I did not consider this objection to be of any relevance as the proceeding before me was at the instance of the Court itself due to the inaction of both the parties. Learned Counsel for the defendants then informed me that he had written four letters to his clients to obtain further instructions but was unsuccessful. He added that he had been made to understand that the 5th defendant had passed away in China. He further informed the Court that he had been instructed the previous day by a staff working for the 6th defendant to proceed with the counterclaim. I must add that there must have been an affidavit to explain the delay and not a mere statement from the Bar by learned Counsel. In this regard I refer to *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 MLJ 281 where Gopal Sri Ram JCA said at p. 287:

> It is a principle fundamental to our system of adverserial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence from the Bar, as was done in this case, is to be deprecated.

In *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 the Federal Court stressed the need for affidavit evidence to answer the notice to show cause. In any event I was not satisfied with the explanation offered by learned Counsel. Counsel did not offer any explanation as to what steps were contemplated to substitute the estate of the 5th defendant as a party. The statement by the clerk to the 6th defendant without any authority from the latter was not convincing. Counsel ought to have taken the necessary steps to set down the action for trial without waiting for instructions from his client. An advocate and solicitor has the whole conduct of the cause and he has power to act without asking his client what he shall do. He is the conductor and regulator of the cause (see R *v. Registrar of Greenwich County Court* [1885] 15 QBD 54; *Richardson v. Peto* [1840] 1 Man & G 896). Alternatively, Counsel ought to have taken steps, after the lapse of a reasonable length of time in failing to communicate with his clients, to apply to Court for an extension of time to set down the matter for trial on that ground. These he had failed to do and had left the matter unattended till awakened by the Court. A litigant must take responsibility for and accept the consequences of delay on the part of his solictior (see *Pereira v. Beanlands* [1996] 3 All ER 528). Thus there was no acceptable explanation offered by the defendants on the delay in prosecuting their counterclaim. The time has come for parties to take a greater interest in litigation where they are involved. If they fail it is the responsibility of the Court to wake them up. In this regard I refer to *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 where Salleh Abas FJ (as he then was) said at p. 153:

If accumulation of cases is regarded as valid criticisms and an anathema against the administration of justice in this country, and we heard these criticism repeated time and time again not only by Judges and lawyers but also by laymen such as politicians and businessmen and other concerned citizens, surely one of the key solutions to this problem is to give power to the Court to intervene in appropriate cases, when situations call for intervention without having to wait to be moved by the parties. The Court should be more active than it has been hitherto. Although the rules laid down elaborate time table for the parties to follow but if the plaintiff does not adhere to it and the defendant is shy or on account of respect for the plaintiff or for any other reason is reluctant to take up the step provided by the rules, the suit is simply pushed into further slumber, and perhaps into deep coma from which it could never regain consciousness and yet for statistical purposes it adds to the backlog of cases giving the Court a bad name as being an indolent lot. Public interest therefore demands that the Court should have the power to wake such sleeping cases and deal with them appropriately accordingly to justice. This is the very reason why in 1976 a small departure was made in our procedural rules, from the English Supreme Court Practice whereby the High Court in this country is given power to issue notice to show cause to the plaintiff to explain why his action should not be dismissed for want of prosecution when he has taken no step to give notice of trial, notwithstanding the fact that the defendant makes no such application and in appropriate cases the Court has power to dismiss the case because of the plaintiff's failure to give satisfactory response to such notice.

Accordingly I dismissed the counterclaim with costs for want of prosecution.

On 17 December 1996 the 5th and 6th defendants filed a motion praying, *inter alia*, that I review the order that I had made on 22 November 1996 with a view to having it set aside. The motion was supported by the affidavit of the 6th defendant the material parts of which read as follows:

5. Semasa Mahkamah yang mulia membuat keputusan pada 22 November 1996, saya tidak mengemukakan sebab-sebab saya dan defendan kelima tidak mengambil langkah-langkah untuk meneruskan tindakan tuntutan balas.

6. Defendan kelima Yong Seet Fun adalah abang saya dan beliau telah meninggal dunia pada 1 Februari 1996 di Negeri China semasa beliau melancong di sana dan surat perakuan kematian pada masa sekarang tidak dapat diperolehi. Disertakan salinan Passport Antarabangsa No: A 6731475 yang dikeluarkan oleh Jabatan Imigresen Malaysia pada 22 April 1994 dan Visa No: 153855 yang ditandakan sebagai ekshibit 'YSL-1'. Defendan kelima tiba di Negeri China pada 27 Januari 1996 dan meninggal dunia pada 1 Februari 1996.

7. Segala urusan mengenai tindakan ini adalah diuruskan oleh defendan kelima dan saya telah memberi mandat kepada beliau untuk menguruskan perkara-perkara mengenai arahan kepada Peguamcara kami.

8. Oleh itu, saya telah menganggap waris-waris defendan kelima dan Peguamcara saya akan mengendalikan kes ini.

9. Akan tetapi saya sesungguhnya percaya bahawa Peguamcara saya juga tidak mengetahui mengenai kematian defendan kelima sehingga saya memberitahu beliau baru-baru ini.

10. Saya difahamkan oleh Peguamcara saya apabila kes ini dijalankan untuk pelupusan (disposal pada 8 November 1996 diatas sebab tiada arahan diterima daripada saya atau waris-waris defendan kelima untuk meneruskan kes dan perkara ini telah ditangguhkan kepada 22 November 1996. Saya tidak memberi apa-apa arahan kerana saya ingin mengambil langkah setaraf dengan waris-waris defendan kelima. Terdapat kelewatan dalam mendapatkan arahan-arahan daripada waris-waris defendan kelima kerana defendan kelima mempunyai dua orang isteri dan segala hal mengenai perkara ini diuruskan oleh orang tengah mereka iaitu Encik Phoa Kia Toon, tetapi malangnya beliau jatuh sakit. Akhirnya waris-waris defendan kelima dan saya hanya memberi arahan kepada Peguamcara saya untuk meneruskan perkara ini pada 21 November 1996 jam 4 petang, dan pada masa itu peguamcara saya tidak dapat mengambil langkah-langkah untuk meneruskan tuntutan disebabkan pelupusan tindakan ini telah ditetapkan pada 22 November 1996 dan atas alasan ini perkara ini ditolak tanpa mengambil langkah-langkah untuk meneruskan tindakan ini.

Learned Counsel for the defendants tendered a written skeletal submission where at pp. 2 and 3 he said as follows:

(c) The 8th defendant was made a bankrupt on 18 May 1995 *via* Bankruptcy No: 29-15-1994 (refer para 15 of the said affidavit).

(e) The matter was called up for disposal on 8 November 1996 regarding the 5th, 6th and 8th defendants' counterclaim as against the plaintiff and the Court was informed that the 5th defendant had died in China whereas the 6th defendant cannot be contacted. The Court was also informed that the 8th defendant has since been made a bankrupt. The matter was accordingly adjourned to 22 November 1996 pending further instructions from clients (refer para. 10 of the said affidavit).

(f) On 21 November 1996 at about 4 pm, the next-of-kins of the 5th defendant and 6th defendant gave instructions to their Counsel to proceed with the counterclaim (refer to para. 10 of the said affidavit).

5. The delay in giving instructions was due to the fact that all along the 6th defendant was relying on the 5th defendant to give instructions to his Counsel on his behalf and upon his death there was a communication breakdown between Counsel, the 6th defendant and the next-of-kins of the 5th defendant. In fact, Counsel only knew of the death of the 6th defendant only recently. (refer to para. 7, 8 and 9 of the said affidavit).

Learned Counsel further contended that when the matter was first called up on 8 November 1996 there was no inordinate delay on the part of the defendants in pursuing the counterclaim bearing in mind the fact that the appeal to the Supreme Court was only decided on 17 July 1995. He added that as the Court had granted time to Counsel to obtain further instructions from his client without making any peremptory order the preceding delay ought to be rendered academic and should not be taken into account in dismissing the counterclaim for want of prosecution. In support of this proposition he referred to the judgment of the Court of Appeal in *Public Finance Bhd. v. Natcom Development Sdn. Bhd. & Ors*. [1996] 2 MLJ 657. He then referred to cases such as *In re Harrison's Settlement* [1955] 1 Ch 260 and *Chua Wah Keow v. Ng Ho Huat & Anor.* [1961] MLJ 32 in support of his argument that I am empowered to review the order that I had made.

Before I proceed any further I shall first determine the extent to which a Court can amend an order that it has made in the context of the application before me. It is settled law that after a judgment or order has been perfected amendments may only be made to it in relation to clerical errors, accidental slips and omissions as provided by O. 20 r. 11 of the Rules of the High Court 1980 (see *Khoo Cheng Tat v. Lim Soon Teck* [1982] 1 MLJ 289; *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 WLR 300; *Hock Hua Bank Bhd. v. Shari bin Murid* [1981] 1 MLJ 143). However, the Court has an inherent power to correct errors to give a clear expression to its intentions in the judgment or order which has been perfected (see *Pearlman (Veneers) SA (Pty) Ltd. v. Bernhand Bartels* [1954] 1 WLR 1457). Such a power exists to enable the Court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce (see *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221; *Hatten v. Harris* [1892] AC 560; *Koperasi Perumahan Kotawira Bhd. v. Kadir bin Kassim & 2 Ors.* [1991] 2 CLJ 1529). A Judge may set aside an order founded wholly upon his own error as to a fact, and not upon any mistake in his deliberation, even though the order be passed and entered (see *Hall v. Harris* [1900] 25 VLR 455).

The gravaman of the application before me is the right of a Court to recall an order which has not been perfected with a view to withdraw, alter or modify it. That the Court possesses such power is undoubted. In this regard I refer to the judgment of the Federal Court in *Chee Kuan Cheng v. Chuo Kong Kah* [1967] 2 MLJ 74 where Ong Hock Thye FJ (as he then was) said at p. 75:

> Moreover, the order had not been drawn up and entered. Until an order is perfected the Court's jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion: see *In re Harrison's Settlement* [1955] 1 All ER 185).

In *re Harrison's Settlement* [1955] 1 All ER 185 a Chancery Judge made an order in chambers and a few days later the House of Lords gave a decision showing that the order was wrongly made. The order was withdrawn by the Judge. In holding that a Judge could withdraw the order before it was drawn up Jenkins LJ said at p. 188:

> We think that an order pronounced by the Judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered.

It may perhaps be argued that the rule, laid down as it is in such wide terms confers upon a Judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. So said Tan Ah Tah J in speaking for the Court of Appeal in *Chua Wah Keow v. Ng Ho Huat & Anor.* [1961] MLJ 321 and added at p. 322:

> In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

And at p. 323:

> The following passage from the judgment of the Court of Appeal *In Re Harrison's Settlement* (at p. 192) is relevant to the point under consideration:
>
> > It is important to remember that in the ordinary way the recall of an unperfected order results in a rehearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced. But in the present cases the parties found it impossible to contend that the schemes were such as could properly be sanctioned by the Court since the decision of the House of Lords in *Chapman v. Chapman, supra,* and accordingly did not avail themselves of the rehearing offered by Roxburgh J.
>
> It is to be observed from this passage that an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced.

A Judge himself may recall an order for the purpose of reviewing it if he was of the view that he was wrong provided that he had acted immediately (see *Pittalis v. Sherefattin* [1986] 2 All ER 227; *Lim Yam Teck v. Lim Swee Chiang & Anor.* [1979] 1 MLJ 162). In *Millensted v. Grosvenor House (Park Lane) Ltd.* [1937] 1 All ER 736 the Judge gave judgment for £50 plus costs. The following day the Judge said that he thought £50 was excessive and he reduced it to £35. The Court of Appeal accepted that a judgment can be recalled at any time until it has been drawn up. Further, the Court upheld

the decision of the Judge to reduce the damages to £35. In *Bastow v. Bagley & Co. Ltd.* [1961] 3 All ER 1101 two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for the loss of an eye. One Division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportions to the other. In *Dietz v. Lennig Chemicals Ltd.* [1966] 2 All ER 962 a master approved a settlement in a Fatal Accidents Acts case, the solicitors on both sides being unaware that the plaintiff widow had already remarried. Before the order was drawn up the true facts were discovered and brought to the notice of the master, who set his order aside. The Judge in chambers held that he had been right to do so and this decision was affirmed by the Court of Appeal and the House of Lords. In referring to the last two cases Russell LJ said in *Re Barrell Enterprises & Ors.* [1972] 3 All ER 631 at p. 637:

> In all these cases there were circumstances of a wholly exceptional character. It is clearly not permissible for a party to ask for a further hearing merely because he has thought of a possible ground of appeal that he originally overlooked. The discovery of fresh evidence has never been suggested as a ground for reopening the argument before the Court of Appeal. If fresh evidence comes to light, of such a character as to call for further consideration of the issues, the right way to deal with the situation is by applying for leave to appeal to the House of Lords: see *Murphy v. Stone Wallwork (Charlton) Ltd.* [1969] 2 All ER 949) or if such appeal be not available in a contempt case, then by application for release.

In *Re XL Petroleum Pty. Ltd.* [1971] VR 560 it was held that having regard to the extensive rights of appeal now conferred on parties, the power to recall an order which has not been passed and entered is one which should be sparingly exercised particularly if the judgment of the Court was appropriate having regard to the facts established before it and in accordance with the relevant law. In *Tomlinson v. Commissioner of Taxation* [1977] 7 ATR 639 it was held that the power of a Court to review an order which has not been perfected can only be exercised judicially and on sufficient ground. In *Lakhand Nathermal v. Kamaluddin bin Maamor* [1991] 1 CLJ 42 Malek Ahmad J (as he then was) said at p. 46:

> A careful consideration of the cumulative effect of all these would appear to be that once a judgment is pronounced, it cannot be altered except by discretion in specific situations ...

In the light of the law relevant to the application made by the 5th and 6th defendants I shall now consider whether there are justifiable grounds to enable me to recall the order that I had made with a view to modify, alter or withdraw it.

The Explanation Now Offered by the 5th and 6th Defendants

As I said in an earlier part of the judgment Counsel who appeared for the defendants on 8 November 1996 merely requested for an adjournment of two weeks which I granted. On 22 November 1996 when the case was called up again learned Counsel for the defendants informed me that he had been made to understand that the 5th defendant had passed away. He had been instructed by the clerk to the 6th defendant on the previous day to proceed with the counterclaim.

The grounds advanced in support of the application now before me portray a totally different picture of the sequence of events. It is alleged that on 8 November 1996 itself the Court was informed that the 5th defendant had died and that on 21 November 1996 Counsel received instructions from the next-of-kins of the 5th Defendant and the 6th defendant to proceed with the counterclaim. I have set out in detail what transpired in Court on 8 and 22 November 1996 thereby making it unnecessary for me to comment on the grounds now advanced. I can only speculate that it was done, perhaps, with a view to bolster the application that has now been made. If these allegations are in fact true they do not fall within the rules entitling me to review the order that I had made as they do not relate to something that had transpired after the pronouncement of the order showing that there was some error in the order as pronounced. At best they would amount to an error in the exercise of my discretion which ought to be the subject matter of an appeal.

Peremptory Order

It was the contention of learned Counsel that the granting of the adjournment of two weeks on 8 November 1996 by me without making any peremptory order rendered the preceding delay academic and should therefore not be taken into account in dismissing the counterclaim for want of prosecution based on *Public Finance Bhd. v. Natcom Development Sdn. Bhd. & Ors.* [1996] 2 MLJ 657. In my opinion the factual matrix of that case is diametrically different from the case before me. When that case was called up for disposal Counsel applied for a month to take the necessary steps to prosecute the action. The adjournment was granted without any peremptory order being made requiring the plaintiff to act within a month. When the case was called up again, after the one-month period, the necessary papers had been filed though after the expiry of the one-month period. The High Court dismissed the action for failure to set down the matter for trial within the one month's time as originally requested by the plaintiff. Under such circumstances the Court of Appeal held that the action ought not to have been dismissed in the absence of a peremptory order as the necessary papers had already been filed even though after the expiry of the one-month period based, perhaps, on the principle of law

enunciated in *Gill v. Woodfin* 25 Ch. D 707 which has been followed in cases such as *Aley Kutty James v. Syed Putra bin Syed Omar Shahabudin* [1979] 1 MLJ 238 and *Idris bin Haji Salleh v. Federal Auto Holdings Bhd.* [1979] 2 MLJ 141. In the matter before me no action whatsoever had been taken by learned Counsel in the intervening period when the case was first called and when the final order was made. Thus, the question of a peremptory order does not arise. I pause to add that if the defendants had set down the action for trial in the intervening period then the question of a peremptory order not having been made would be highly relevant. Even if it can be argued that there was a need for such an order before I dismissed the counterclaim then that again is a matter for argument at the appellate level.

Failure of Plaintiff to File an Affidavit

I have already dealt with this issue in an earlier part of the judgment.

That There Was No Inordinate Delay

I have also dealt with this issue earlier. Even if it can be argued that there is a need to establish inordinate delay on the part of the defendants in the prosecution of their counterclaim and that the delay was not inordinate enough for me to act the way I did then that, in my opinion, is also a matter for submission at the appellate level.

I am satisfied that the 5th and 6th defendants have not advanced any cogent reasons to enable me to review the order that I made on 22 November 1996. In my opinion the position of the 8th defendant is different and the order made against him requires review even though he had not made an application to that effect. When I made the order it was not brought to my attention that he had been adjudged a bankrupt. Upon a person being adjudged a bankrupt his estate vests with the Official Assignee and as Siti Norma Yaakob J (as she then was) said in *Sabah Bank Bhd. v. Syarikat Bintang Tengah Sdn. Bhd. & Ors.* [1992] 2 MLJ 588 at p. 590:

> ... it is for this reason that s. 38(1)(9) was enacted, as it only stands to reason that the Official Assignee must first be consulted as any action intended by the bankrupt may well be detrimental to his creditors.

Furthermore, the retainer of solicitor of the 8th defendant is terminated upon his bankruptcy (see *Re Moss* [1866] LR 2 Eq 345). The rationale may be either that, upon the act of bankruptcy, a different principal is created or, and this is the preferred theory, that where a principal can no longer act for himself, so also the agent whom he has appointed can no longer act for him (see *Drew v. Nunn* [1879] 4 QBD 661). I am therefore of the view that the notice to show cause with regard to the 8th defendant ought to have been

served on the Official Assignee and the order that I had made against him may be wrong. Accordingly, I withdraw the order that I made against the 8th defendant and direct the Senior Assistant Registrar to serve a fresh notice on the Official Assignee.

In the upshot I dismiss the application of the 5th and 6th defendants with costs.

Reported by Ling Hea Hoon